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IN THE

Supreme Court of the United States

October Term 1974

No. 74-133

MARCUS MORALES CALDERON,
Petitioner,

vs.

BOARD OF EDUCATION OF THE EL MONTE SCHOOL DISTRICT OF LOS ANGELES COUNTY,
Respondent.

On Appeal from the Court of Appeal of California, Second Appellate District

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

MARCUS MORALES CALDERON,
1522 North Mariposa Avenue
Los Angeles, California 90027
663-6745
In Propria Persona.

WESTERN PRINTING COMPANY, WHITTIER—GIBSON 8-1788

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

The petitioner Marcus Morales Calderon respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the Court of Appeal of the State of California, Second Appellate District, from which a petition for hearing was denied by the Supreme Court of California on May 22, 1974.

OPINION BELOW

The Opinion of the Court of Appeal was accompanied by instructions that it not be published in the official reports. It is attached hereto as Appendix A.

A copy of the Order by the Supreme Court of California denying a hearing, of the Judgment of the Superior Court of California for the County of Los Angeles, and of the Proposed Decision of the California Office of Administrative Procedure are attached hereto as Appendices B, C and D respectively.

JURISDICTION

The Judgment of the Court of Appeal of the State of California, Second Appellate District, was entered on March 27, 1974. A timely petition to the Supreme Court of California was denied on May 22, 1974, and this petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

Whether a school district, as an agency of the State, can use the precise factual issue of a criminal charge of which a probationary teacher has been acquitted by jury as a ground for not reemploying the teacher. Whether the Los Angeles County Counsel, the California Attorney General and the respondent have used a teacher non-reemployment proceeding against petitioner as a means of libeling petitioner. Whether the proceedings against petitioner reflect a larger plan constituting an unlawful threat to the authority of the Federal Government.

STATUTES INVOLVED

The provisions of California Education Code Section 13443 as of the date of the within non-reemployment proceeding are set forth as Appendix E.

STATEMENT OF THE CASE

Petitioner and respondent are also appellant and appellee, respectively, in an appeal now before this Court entitled Marcus Morales Calderon vs. Board of Education of the El Monte School District of Los Angeles County No. 73-1615. As is explained in said appeal, petitioner is employed by respondent as a certificated probationary teacher in the El Monte School District of Los Angeles County, but has been on compulsory leave of absence from said employment since May 7, 1970. This petition and the appeal stem from separate proceedings. In each of these proceedings respondent seeks to dismiss petitioner from said employment. In each proceeding respondent alleges the same cause for dismissal. As is also explained in the accompanying appeal, said alleged cause is a precise repetition of a charge of homosexual oral copulation of which petitioner was entirely acquitted in a criminal jury trial. In the proceeding from which the appeal stems respondent seeks to dismiss petitioner as of a date during the 1970-1971 school year. In the proceeding from which this petition stems respondent seeks to dismiss (not reemploy) petitioner as of the start of the 1971-1972 school year.

Without this petition the practical effect on any

ruling by this Court forbidding respondent to dismiss petitioner as of the 1970-71 school year could be defeated by means of the non-reemployment proceeding. That is, if respondent prevailed in his intent not to reemploy petitioner for the 1971-1972 school year, it would be academic whether respondent was entitled to dismiss petitioner during the 1970-1971 school year.

Both proceedings have been pending since March of 1971, the non-reemployment proceeding have been filed prior to the midyear dismissal proceeding. While the proceedings were at the trial court level petitioner moved to have the midyear dismissal proceeding abated on the ground of a prior action pending between the same parties on the same cause. Said Motion was denied. The Court of Appeal did not file a decision in the non-reemployment proceeding until after the appeal to the U.S. Supreme Court had been filed in the midyear dismissal proceeding. Petitioner filed a petition for rehearing of the non-reemployment appeal, accompanied by a request that the rehearing be delayed until after the U.S. Supreme Court had acted in the midyear dismissal appeal, which had been scheduled for the October Term 1974. In support of the petition for rehearing petitioner submitted that if the U.S. Supreme Court ruled in petitioner's favor the Court of Appeal might want to change its decision to conform to the Supreme Court's ruling. The petition for rehearing was denied. When petitioner applied to the State Supreme Court in the present proceeding he requested that if the State Supreme Court were inclined to rule against him it defer its decision until after the

U.S. Supreme Court had acted in the midyear dismissal appeal. This was also in view of the fact that, in order for the U.S. Supreme Court to have jurisdiction over a civil proceeding in a State Court, an application to this Court must be filed within 90 days after a final decision by the highest State court to which an appeal in the proceeding is possible. If the State Supreme Court followed the usual time schedule in denying the petition, the 90 day period would expire prior to the October 1974 term of the U.S. Supreme Court. Therefore, unless an application for review by this Court had been filed within that period, the non-reemployment decision would be final and non-appealable and hence any action by this Court in the midyear dismissal appeal would be moot.

Since the requests for a delay in the decision by the State Court have not been granted, petitioner is constrained to file this petition even though most of the issues of Federal law on which it is based have already been covered in the copending appeal.

It would be needlessly consuming of this Court's time for petitioner to repeat at length the legal arguments that are contained in the accompanying appeal. Instead, this petition is directed mainly to showing that in the non-reemployment proceeding respondent has assisted in skullduggery by the Los Angeles County Counsel, the California Attorney General and several Justices of the Court of Appeal. Petitioner also proposes to show that the conduct of these officials re-

flects a policy aimed against the Constitutional Government of the United States.

As is more fully developed in the accompanying appeal, petitioner's main defense to the non-reemployment proceeding at the administrative trial, at the Superior Court hearing and in the Court of Appeal has been collateral estoppel. That is, petitioner has maintained throughout these proceedings that the factual issue of a criminal charge of which a defendant has been acquitted by jury cannot again be litigated by the State or its agent against the same defendant. (*Ashe v. Swenson* (1970 397 U.S. 436,460). As an answer respondent has cited the doctrine that an acquittal is no bar to a civil action against the defendant, even by the State if the purpose is remedial, arising from the same facts on which the criminal charge was based. In his Closing Brief before the Court of Appeal (Certified Record) petitioner has pointed out that this doctrine refers only to cases in which the factual issue of the civil action is different from that of the criminal charge, e.g., *Helvering v. Mitchell* (1937) 303 U.S. 39, where an acquittal of income tax evasion did not bar the Government from suing the defendant for back taxes plus a penalty for improprieties in the tax return not requiring criminal intent. The Opinion ignores this point and treats *Helvering* as though it authorized the Government to repeat in a civil action the precise factual issue of an acquitted criminal charge against the same defendant. In his Closing Brief petitioner also explained that, although the Federal courts have upheld

civil actions alleging acts of which the defendants have been acquitted in criminal trials, this is only in cases where the civil plaintiff is not the State or its agent. Petitioner has also explained exhaustively before the Court of Appeal that respondent is an agency of the State. (*Hall v. City of Taft* (1956) 47 Cal. 2d 177) The Opinion does not acknowledge this point. On the contrary, it treats a decision in *Gibson v. Gibson* (1971) 15 Cal. App. 3d 943, which upholds the rights of a private plaintiff to base a civil action on the same charge of which the defendant has been acquitted in a criminal proceeding, as though this was the same as upholding the right of the State or its agent to repeat the acquitted charge.

Petitioner proposes to show that these are not honest mistakes in law by the Court of Appeal and that the Opinion was not filed in good faith.

As explained in the accompanying appeal, the nonreemployment proceeding was tried in the State Office of Administrative Procedure before a Hearing Officer. The Hearing Officer found the charge of oral copulation to be untrue but stated that petitioner had committed some unspecified homosexual offense and on this ground recommended that petitioner not be reemployed. Respondent adopted this recommendation, whereupon petitioner filed a petition for a writ of mandamus in the Superior Court to compel his rehiring. In this petition petitioner sought, in addition to back salary, damages in the amount of $250,000. The damage claim was on the ground that the alleged cause for

non-reemployment was libelous and that in failing to reemploy petitioner respondent had refused to perform a ministerial act absolutely required by law. Respondent demurred to the petition on grounds including the allegation that damages in addition to back salary could not properly be sought in a mandamus arising from a teacher non-reemployment proceeding. The Superior Court overruled the demurrer. (Clerk's Transcript, pages 35, 43) This was consistent with California Code of Civil Procedure Section 1095 which provides as follows for a mandamus proceeding:

> "If judgment be given for applicant, he may recover the damages he has sustained, as may be determined by the court or referee, upon a reference to be so ordered, together with costs, and for such damags and costs execution may issue; provided, however, that in all cases where the respondent is an officer of a public entity, all damages and costs, or either, shall be recovered and awarded against the public entity represented by such officer and not against the officer. For the purposes of this section, 'public entity' includes the State, a county, city, district or other public agency or corporation."

When petitioner appealed the Superior Court judgment he pursued his claim for damages in his Opening and Closing Briefs. However, the Opinion makes no reference to the damage claim other than a statement that in addition to seeking reemployment petitioner had sought "related relief." In his Brief before

the Court of Appeal the County Counsel has not disputed that Section 1095 provides for the payment of damages in addition to back salary to a teacher who has prevailed in a mandamus proceeding against an attempted non-reemployment, where the non-reemployment has been attempted in violation of the law and with injurious results to the teacher. It will hardly be disputed that petitioner *has* suffered damages. Therefore, respondent's position on this point would seem to be that he denies liability for the injuries caused by the non-reemployment proceeding on the ground that he had a legal right to bring the proceeding.

Through the following analysis of various papers filed in this proceeding by respondent et al, petitioner proposes to show that these papers in themselves are prima facie evidence of libelous intent. Petitioner submits that the papers to be analyzed indicate bad faith in the authors at least to the extent that a sham pleading when filed by a lawyer supports an inference that the lawyer was aware of the pleading's spuriousness. This is the inference an appellate court usually makes when it assesses damages against an appellant who files an appeal on frivolous grounds.

An example of such a document is the one filed with this Court by the County Counsel entitled *Motion to Dismiss an Appeal from the Court of Appeal of California, Second Appellate District (Rule 16) No. 73-1615.*

In support of a contention that the Constitutional

issues discussed in the accompanying appeal were not timely raised, the document states on page 7: "The appellant did not raise any federal or constitutional question either at the trial stage or before the Court of Appeal."

The certified record filed with the appeal shows that collateral estoppel, a Federal rule, was extensively argued before the Court of Appeal in appellant's Opening and Closing Briefs.

The *Motion to Dismiss Appeal* also states on page 8: "In the entire opinion, there is not one reference to a federal statute, the United States Constitution or even a case citation from a federal court or from the United States Supreme Court."

Collateral estoppel is discussed in the Opinion, and if the County Counsel did not realize this was a Federal rule he would have been apprised of it by reading one of the five cases cited by the Opinion in support of a statement it contains as follows: "While considering appellant's contention that his acquittal of the criminal charge (288a, Pen. Code) should be sufficient to permit him to continue as a teacher, we cannot ignore the fact that a conviction can be based only on a determination of guilt beyond a reasonable doubt. 'A judgment of acquittal does not establish that the acts constituting the offense charged were not committed by the defendant; it means only that they were not proved beyond a reasonable doubt.' " As an authority for this quotation the Opinion cites *Gibson v. Gibson*

(1971) 15 Cal. App. 3d 943 *supra.* In *Gibson* the court said it was following a rule it had followed in another case, *In re Anderson* (1951) 107 Cal. App. 2d 670. The *Gibson* court states on page 947: "This court in *Anderson* relied on the *Helvering* case, (also cited by the Supreme Court above) and commented as follows (at p. 672): 'In *Helvering v. Mitchell,* 303 U.S. 391 . . . , in holding that an acquittal in criminal proceedings was no evidence of non-guilt in civil actions arising out of the same facts the court said: 'The difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of res judicata. The acquittal was "merely an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused." *Lewis v. Frick,* 233 U.S. 291 . . . It did not determine that Mitchell had not willfully attempted to evade the tax. That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, has long been settled.' "

It is very obvious that the ruling by the United States Supreme Court in *Helvering supra* is used throughout the Opinion as a major authority. The fact that instead of citing *Helvering* by name the Opinion cites California decisions that are based on *Helvering* does not remove the rule involved from Federal jurisdiction.

Had petitioner in fact failed to raise this Federal question at the trial court level the omission would have been cured when the Court of Appeal considered

the question. As stated in *Stern's Supreme Court Practice, Fourth Edition, Section 3.28*: "Where the highest state court assumes or holds that a federal question is properly before it and then proceeds to consider and dispose of that issue, the Supreme Court's concern with the proper raising of that question in the state courts disappears. *Whitney v. California,* 272 U.S. 357, 360 - 1; *Manhattan Life Ins. Co. v. Cohen,* 234 U.S. 123, 134; *Coleman v. Alabama,* 377 U.S. 129, 133."

However, the copy of the trial court's Conclusions of Law, attached to the Jurisdictional Statement No. 73-1615 as Appendix C, shows on page 19, item 2, that the issue of collateral estoppel was raised in the trial court. The certified record shows that it was also pleaded in the Answer to the Complaint. A copy of two relevant pages of the Answer is attached hereto as Appendix F. It will be noted that paragraph V of the Answer includes the language, "The complaint is barred by United States and California law."

One must therefore attribute an incredible degree of ignorance to the County Counsel in order to believe that he thought he was speaking truthfully in his motion to dismiss the appeal.

Respondent School Board claims to believe it was authorized to allege oral copulation under California Education Code Section 13443. Surely the Board was aware of the section's provisions. These require that a teacher be notified of an intent not to reemploy on or before March 15 of the school year. If such notification

is not made by that date the Board cannot proceed against the teacher under Section 13443. This provision is strictly enforced by the courts and is well known in school administration circles. The notice has no effect on the teacher's employment rights for the remainder of the school year in which it is served. It must therefore have been obvious to respondent that the section was not legislatively intended for the trial of any issue serious enough to warrant immediate dismissal. A cause for non-reemployment is tried before a single Hearing Officer according to rules of evidence which, while less strict than those followed in a civil court, are appropriate for the matters normally considered under the section, e.g., whether the teacher is reasonably diligent in preparing lessons, whether he maintains proper classroom discipline, whether he gets along reasonably well with the other teachers. On the face of it, can one reasonably suppose that Respondent Board really believed that this section was intended for the trial of an allegation of felonious moral turpitude?

In 1963 Justice James A. Cobey, who wrote the Opinion in the non-reemployment appeal, was a Senator in the California Legislature. At this time he wrote and introduced Senate Bill No. 42, which was then enacted as Government Code Section 821.6, providing as follows:

> "A public officer is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his

employment, even if he acts maliciously and without probable cause."

If it is assumed that this statute expresses Justice Cobey's personal convictions, it follows that he believes that malicious acts can be within the scope of public employment. Certainly he was aware when he wrote that statute that it would remove a principal deterrent to the bringing of administrative proceedings for malicious purposes. (California *1963 Senate Final History,* page 20).

In *Sarac v. State Board of Education* (1967) 249 Cal. App. 2d 59, 63, Justice Cobey states: "Homosexual behavior has long been contrary and abhorrent to the social mores and moral standards of the People of California as it has been since antiquity to those of many other peoples." Realizing this, Justice Cobey would be aware that the bringing of such a charge through an administrative proceeding would be an effective means of implementing the maliciousness he seems to think is within the scope of public employment. As is noted in the Opinion under Facts, first paragraph, the non-reemployment proceedings were instituted one day before the acquittal. Certainly Justice Cobey would be aware that on conviction of such a charge dismissal would be automatic. (California Ed-

ucation Code Sections 13207[1] and 13255[2]) If he credited the respondent with also realizing that, the inference would be that Respondent Board expected an acquittal. On the face of the record, respondent claims to have believed at the time he instituted the non-reemployment proceeding that, while the evidence was such as to indicate an acquittal on the basis of reasonable doubt, it would also justify a judgment against petitioner according to the preponderance of evidence rule. A transcript of the criminal trial testimony of the two arresting security agents is among the Exhibits herein, available to this Court on its order. Some excerpts from this testimony are quoted below in reference to the issue of whether respondent could have honestly believed that petitioner needed the benefit of a doubt to be acquitted:

The arrest occurred in the men's restroom of Sierra Hall at Los Angeles City College. The security agents testified that when first observed the defendants were in a toilet stall area having partitions which concealed their bodies from view from the restroom proper ex-

[1]"Whenever the holder of any credential * * * issued by the State Board of Education *or the Commission for Teacher Preparation and Licensing* has been convicted of any sex offense as defined in Section 12912 or narcotics offense as defined in Section 12912.5, the * * * *commission* shall forthwith suspend the credential * * *. If the conviction is reversed and the holder is acquitted of the offense in a new trial or the charges against him are dismissed, the * * * *commission* shall forthwith terminate the suspension of the credential * * *. When the conviction becomes final or when imposition of sentence is suspended the * * * *commission* shall forwith revoke the credential * * *."

[2]"Governing boards of school district shall not employ or retain in employment persons in public school service who have been convicted of any sex offense as defined in Section 12912 or narcotics offense as defined in Section 12912.5. If, however, any such conviction is reversed and the person is acquitted of the offense in a new trial or the charges against him are dismissed, this section does not prohibit his employment thereafter."

cept for their feet. The agents testified that while standing in the restroom proper they saw the defendants' feet in incriminating positions and this caused them to enter the restroom proper where they caught the defendants in an act of oral copulation. (1538.5 Transcript, page 22, lines 3-26)

After one of the agents, Gary Dayton, had testified to this effect at the preliminary hearing, a defense investigator, Mr. Wyn Rummler, measured and photographed the restroom. On August 25, 1970, Mr. Rummler sent a letter to the District Attorney, then Evelle Younger, stating that the structure of the toilet stall partitions would not permit the views of the feet testified to by the security agents. On September 1, 1970, Mr. Rummler visited the lieutenant of the Los Angeles City College Campus Police, Richard Steines, and gave him this information. At this time Mr. Rummler also gave Lieutenant Steines a letter addressed to the head of the Campus Police, Harold Cole, requesting him to testify in court to the correctness of the information. A copy of this letter is attached hereto as Appendix G. Subsequently to this interview Lieutenant Steines ordered the toilet stall partitions removed. On or about the date this order was given, Judge Thomas L. Griffith, who was hearing a motion in the criminal proceedings, announced he intended to examine the restroom himself. Whether the order to remove the partitions was given before or after the judge's announcement petitioner is unable to state with legal certainty. However, the partitions were removed before the judge

could see them. The other security agent, Patrick Delaney, subsequently testified concerning this as follows:

> Q. Do you know when they were removed?
>
> A. I was at the Los Angeles County Sheriff's Academy at the time they were removed and from the information that I gathered, I believe it was two days prior to the date that you referred to of the hearing when the judge asked if he could go out and see it.
>
> . . .
>
> HEARING OFFICER: Do you know why?
>
> WITNESS (Agent Delaney): Yes sir, because of a written request by the lieutenant of our college police . . . (Transcript No. OLA 26018, page 104, lines 12-17; page 106, lines 10-12)

Mr. Rummler testified at the criminal trial that the views of the feet claimed by the security agents would have been impossible. Since this contradicted the agents' testimony, it might be asked whether Mr. Rummler's testimony is supportable by a preponderance of the evidence or whether it was sufficient merely to create a reasonable doubt as to the truthfulness of the agents' testimony. The answer to this question does not depend on Mr. Rummler's word. The question can be answered through measurements of the restroom provided by the security agents themeselves.

At the trial of the midyear teacher dismissal proceeding the County Counsel introduced a floor plan of the restroom prepared by Mr. Dayton with notations

of measurements made by Mr. Delaney. A copy of the County Counsel's floor plan is attached hereto as Appendix H. According to Mr. Delaney's measurements, the restroom enclosed an area 21 feet eight inches east and west by 17 feet nine inches north and south. A row of four toilet stalls, each about 36 inches wide according to the County Counsel's measurements, abutted the north wall, starting at the northwest corner. On the diagram the stalls are numbered in succession 1, 2, 3 and 4, with stall number 4 being in the northwest corner. The other three stalls were doorless. The partition between stalls 2 and 3 contained a hole which is noted on the diagram as being three inches in diameter, 29½ inches from the front of the stall and 30½ inches from the north wall. This, of course, means that the partitions were 63 inches in length. The distance of the hole from the floor is given as 35¾ inches. A dividing wall ran from the west wall along the front of the stalls for their combined width. The diagram states that this dividing wall was seven feet eight inches from the north wall, which would leave a passage way into the stalls of about two and a half feet. The door to the restroom was located at the southeast corner of the east wall. In front of the door was a partition extending at a right angle from the south wall to a point four feet south of the line of the dividing wall and forming an entranceway. The diagram does not give the distance from the bottoms of the stall partitions to the floor, but at a pretrial hearing Mr. Dayton testified that this was eight inches. (1538.5 Transcript, page 52, lines 16, 17) At the non-reemployment hearing Mr.

Delaney testified that views of the feet through the spaces underneath the stall partitions were the only views of the occupants of stalls 2 and 3 that were obtainable from the restroom proper. (Transcript No. OLA 26018, page 22, lines 7-17) At a pretrial hearing Mr. Dayton testified that he was five feet eight inches tall and that while standing in the restroom proper he saw the codefendant's feet facing east from stall 3 near the hole in the partition and petitioner's feet facing southwest from stall 2 toward the co-defendant's feet. (1538.5 Transcript, page 22, lines 3-18, page 90, lines 19-21)

To show the impossibility of this is a matter of simple geometry. Draw a side elevation of the stall partitions viewed from any position in the restroom proper. Project the line of sight underneath the stall partitions of a person five feet eight inches tall standing in any position in the restroom proper. Thereby it will be seen that, while there is a position west of the door partition from which it would be possible to see the tip of one of the feet of a person facing east from stall 3 as described, there are no positions anywhere in the restroom proper from which it would be possible to see any part of the feet facing southwest from stall 2 as described.

At the criminal trial the defense introduced a floor plan of the restroom prepared by Mr. Rummler on which the dimensions were substantially the same as on the one later introduced by the County Counsel at the midyear teacher dismissal trial. However, when

Mr. Delaney was asked at the criminal trial whether Mr. Rummler's diagram was correct, he replied as follows:

A. Well, if you stretch your imagination a little bit, we could call it accurate. But I can point out quite a few discrepancies in the drawing itself.

. . .

Q. Would you please indicate, using the orange crayon, the areas in which you feel the diagram is in error as to the setup of the washroom as on May 6, 1970?

A. First of all in reference to the entranceway, the entranceway should be in a more northerly direction, a little bit closer to the dividing wall between the stall area and the washbasin area, which would be approximately here.

Q. Could you make an orange line and a cross where you feel the entranceway should be shown?

A. The entrance partition should be extended to this area here. (Marking the diagram.)

. . .

Q. Very well. Now, if a person took a normal step — going by your dimensions now, Officer — if a person took a normal step of, say, two feet, if they were in the entranceway, stepped out two feet, they would then be parallel with the dividing wall according to your testimony; is that correct?

A. As close as I could depict, I guess it would. (Partial Trial Transcript, page 124, lines 19-21; page 125, lines 4-15; page 180, lines 15-19)

The County Counsel's own dimensions (Appendix H), like those testified to by Mr. Rummler, show that the distance from the end of the entrance partition to the line of the dividing wall was four feet. Therefore, a person standing within the entranceway would have to take one or two more steps than Mr. Delaney claimed in order to reach the line of the dividing wall. Hence, if the jurors thought there was a reasonable doubt that Mr. Delaney's version was correct, they would have undoubtedly regarded it as disproved by a preponderance of the evidence if they had seen the County Counsel's diagram.

Another issue before the jury was whether to believe the testimony of the security agents as opposed to the testimony of a Los Angeles Police Officer, Dale W. Bootow, concerning the preparation of the arrest report. Officer Bootow is one of two policemen who transported petitioner and the codefendant Alex Diaz to the police station after being called by the security agents. Testifying for the defense, Officer Bootow said that he had written the security agents' account of the arrest in the report while they told it to him. One of the statements in the arrest report is as follows:

> "Witnesses stated that they had obs. suspect #1 (Diaz) loitering around Sierra Hall on the campus at L.A.C.C. Wts. stated that susp. #1 went into Sierra Hall and observed susp. #2 go into the mens room. After susp. #2 went into mens room, susp. #1 entered the same mens room." (Certified Record, Clerk's Transcript, page 26)

Contradicting this, Mr. Dayton testified at the criminal trial as follows:

> Q. Now where was Mr. Diaz when you observed him at the time you first saw him?
>
> A. I first saw him come down the hall and go into the men's restroom.
>
> . . .
>
> Q. Do you recall telling the police officer — I don't have his name — but do you recall telling one of the police officers that took down the police report that you had observed Mr. Diaz loitering around the location prior to the time you saw him in the corridor?
>
> A. I don't remember saying that. (Partial Trial Transcript, page 8, lines 17-20, page 60, lines 7-12)

On the same point Mr. Delaney testifed as follows:

> Q. And had you seen Mr. Diaz outside the location or was the first time you saw him when he was walking down the corridor in your direction?
>
> A. When he was walking down the corridor in my direction was —
>
> . . .
>
> Q. . . . Either you or your partner called the LAPD after you effected the arrest; is that correct?
>
> A. That's correct.
>
> Q. And either you or your partner gave the officers certain information; is that correct?

A. That's correct.

. . .

Q. Are you familiar with the passage that says, "Witnesses stated that they had observed suspect number one loitering around Sierra Hall," suspect number one being Mr. Diaz. . . .

. . .

A. Not really. I understood it completely when you read it to me, but I don't recall that exact passage from that exact report.

Q. Do you recall saying anything in that general area to the police officers as to what I just read?

A. I don't remember.

Q. Do you recall being present if and when Mr. Dayton might have made that comment?

A. I don't remember. (Partial Trial Transcript, page 153, lines 17-21; page 154, lines 2-7; page 155, lines 12-20)

If one believed the security agents about this the inference would be that Officer Bootow put things into the arrest report that the security agents had not told him.

A transcript of Officer Bootow's testimony is available to this Court on request. In order for respondent or the County Counsel to have believed that a preponderance of evidence made Officer Bootow a less credible witness than the security agents they would have

to have evidence that discredited the officer. They have no such evidence.

During the criminal trial, on motion by the defense, each of the security agents was excluded from the courtroom while the other was testifying. At the non-reemployment hearing, petitioner's attorney repeated the motion. The County Counsel resisted the motion on the ground that Mr. Dayton was his investigating officer and, as such, entitled to remain in the hearing room while Mr. Delaney was testifying. The Hearing Officer ruled that Mr. Dayton could do so, after which the following exchange occurred:

> MR. COLLINS (petitioner's attorney): Your Honor, this is a ruse. It is not a bona fide request by counsel. These two individual officers, Dayton and Delaney, were both arresting officers. It's highly important that they not be present at the same time when the other officer is testifying. This is merely an attempt by opposing counsel, I'm afraid, to get around the exclusion rule and to have his other witness present during the testimony of Officer Delaney.
>
> . . .
>
> MR. WAGNER: Mr. Hearing Officer, he (Dayton) is one of the investigating officers. He is here to assist me in this matter. . . .
>
> HEARING OFFICER: I am not going to change my ruling. I have granted Mr. Wagner's request. That is how it will stand, Mr. Collins.

(Transcript No. OLA 26018, page 11, line 21, to page 12, line 16)

As to whether in actuality Mr. Wagner was using Mr. Dayton as an assistant, or would even consider doing so, the following is illuminating:

The transcripts show Mr. Delaney to be a much better articulated and, on the surface, more persuasive witness than Mr. Dayton. An example of Mr. Delaney's fluency is provided by his following two explanations of why he and Mr. Dayton followed petitioner into the restroom. He gave the first explanation during the criminal proceeding, the second at the non-reemployment hearing.

> Q. I see. What — what other observation or information did you have that took you there?
>
> A. The other observations being the fact that we had made numerous — numerous arrests prior in this area. Secondly, that persons who usually frequent a college campus and have some type of participation in the activities on the college campus carry books or notebooks or papers and pencils and other paraphernalia with them, which these gentlemen did not have, and plus the fact *we had never seen either of these gentlemen* before and we are relatively familiar with most of the people on our campus. (1538.5 Transcript, page 164, lines 14-25) (Emphasis added)
>
> Q. What, Mr. Delaney, was it about the respondent that made you suspicious of him?

A. Nothing actually, except for the fact that he was in the building that wasn't occupied by any classes or there was no activity being conducted in this building; there was already one person in the restroom who had no books or paraphernalia *that my partner had indicated he had seen in the area before loitering around the restroom area.* So there was nothing directly toward the respondent that made us — (Transcript No. OLA 26018, page 84, line 22, to page 85, line 1) (Emphasis added)

Despite the contradiction (italicized), this testimony shows considerably more mental ability than Mr. Dayton's testimony, as exemplified by the following answers Mr. Dayton gave to questions in reference to a diagram he had drawn of the restroom:

Q. First, Officer, how many feet from the doorway to the bathroom were you stationed when you were observing Mr. Diaz and Mr. Calderon in the commode?

. . .

A. How far from this partition or the door?

Q. Now we are talking about how many feet from the door you were.

A. Which door?

Q. The door you use to enter the bathroom.

A. This door?

Q. That door. This is the only door you are going to use to enter the bathroom.

A. That's correct. (Preliminary Hearing Transcript, page 29, line 19, to page 30, line 8)

By the time of the midyear teacher dismissal proceeding Mr. Delaney had moved to Kansas. Mr. Dayton was still in Los Angeles and available as a witness. Nevertheless, Mr. Wagner had Mr. Delaney return from Kansas to testify. The cost of the trip, according to a cost claim Mr. Wagner tried to have the Court adjudge against petitioner, was about $500. Mr. Dayton was also present at the midyear dismissal trial, and Mr. Wagner again had him exempted from the exclusion of witnesses rule on the ground that he was still assisting the County Counsel.

It would seem that if Mr. Wagner had really thought that much of Mr. Dayton as an assistant, he would have regarded him that way as a witness, but he did not have Mr. Dayton testify at either the non-reemployment hearing or the midyear dismissal trial.

In pursuing his contention that the acquittal was not sustainable by a preponderance of the evidence, respondent seems to have also been intent on causing petitioner's defense expenses to be as high as possiible. Although the midyear dismissal proceeding made the non-reemployment proceeding superfluous, even from respondent's purported standpoint, the necessity of defending against the two proceedings simultaneously, of course, doubled petitioner's expenses. While the petition from the non-reemployment decision for a writ of mandamus was pending the County Counsel filed a demand for a $100 deposit to secure the respondent's

costs in the proceeding. The demand was disallowed by the Court as having no basis in law (Certified Record, Clerk's Transcript, page 34) In a teacher non-reemployment proceeding any transcript ordered by the teacher is at his own expense, roughly $300 per day of testimony. When petitioner ordered a transcript of the non-reemployment hearing for filing in the mandamus proceeding, the County Counsel ordered a copy for his own use. When the mandamus petition was denied the County Counsel filed a claim against petitioner for the cost of the County Counsel's copy. Petitioner filed a motion to strike the claim on the ground, inter alia, that the copy had not been filed. The County Counsel, Mr. Wagner, then stated to the Court that the copy *had* been filed. The Court denied the cost claim nevertheless. (Certified Record, Clerk's Transcript, page 65. Mr. Rummler then searched the files of the Superior Court Clerk and discovered that they did not contain the County Counsel's transcript or any notation by the Clerk indicating it had been filed. Mr. Rummler complained to the Los Angeles County Board of Supervisors that Mr. Wagner had deceived the Court. The County Counsel's Office then sent Mr. Rummler a letter stating that the transcript must have been lost by the Clerk after being filed. A copy of the County Counsel's letter is attached hereto as Appendix I. Following the decisions by the Court of Appeal in the mid-year dismissal and non-reemployment proceedings Mr. Wagner filed cost claims of $52.40 and $35.35, respectively, on the allegation that respondent had spent

those sums for the printing of briefs. Copies of these claims are attached as Appendices J and K. The Certified Record in each case shows that both of respondent's Briefs were photocopied from typewriting and were of 16 and 14 pages respectively. Undoubtedly they were copied on a machine in the County Counsel's Office, but if they had been done at a commercial shop the charge could hardly have been over $12 for either Brief. Petitioner wrote to the County Counsel asking for a copy of a receipt for any such payment. Mr. Wagner acknowledged the letter but ignored the request. Did those receipts *also* get lost? California Education Cod 13441[3] required that when a judgment is against a teacher in a midyear dismissal proceeding charging immoral conduct the school board obtain at its own expense a transcript of the proceedings. Respondent did not do so. Had respondent ordered the transcript petitioner could have obtained a copy for considerably less than the Reporter's estimated charge for the original, $850. Petitioner could not afford the $850 fee, and in the midyear dismissal Opinion Justice Lillie commented on the absense of the transcript in a manner adverse to petitioner. The credential revocation proceeding which, as explained in the accompanying appeal No. 73-1615, was also based on the acquitted charge, was tried on August 28, 1973. At the date this

[3]"If an employee is dismissed for immoral conduct or conviction of a felony or crime involving moral turpitude, the governing board shall transmit to the State Board of Education and to the county board of education which issued the certificate under which the employee was serving at the time of his dismissal, a copy of the reporter's transcript of the hearing accompanied by a request that any certificate issued by the county board of education to the employee be revoked if the employee is not reinstated upon appeal."

petition is filed nearly one year will have elapsed without a decision in the credential revocation proceeding having been filed. Judging by the fact that the Court of Appeal delayed its decision in the non-reemployment appeal for eight months after the hearing, a decision against petitioner in the credential revocation proceeding could still be filed, at some date when the time and expense of appealing it would handicap petitioner in his present application to the United States Supreme Court.

A 1970 case decided under Criminal No. 18202 by Justice Wood and Justice Thompson, who concurred in Justice Lillie's decision in the midyear dismissal appeal, throws a quizzical sidelight on the statement by Justice Lillie as follows: "We reasonably assume, therefore, that our Legislature properly intended by the enactment of the pertinent sections of the Education Code to shield children of tender years from the possible detrimental influence of teachers who commit acts described therein (Section 12912) even though they are not found guilty beyond a reasonable doubt." In the decision No. 18202 another teacher had been arrested on a charge of oral copulation in a restroom. The arrest resulted in Complaint No. A-006591, which was prosecuted by the Los Angeles County District Attorney, then Evelle Younger. The teacher was convicted. This teacher had a prior arrest record of loitering in a restroom, soliciting oral copulation in a restroom, indecent exposure and resisting arrest. These earlier charges, which were prosecuted in the North

Orange County Judicial District under No. M-80707, had resulted in the teacher being found guilty of violating California Penal Code Sections 148 and 415. At the time these arrests occurred this defendant held a prominent teaching position in the State system of public instruction, and the file shows that the District Attorney was informed of this fact after the second arrest. This teacher continues to occupy that position today. Many of his students are prospective entrants into the teaching profession and his judgments affect the decisions of the State Commission for Teacher Preparation and Licensing as to whether to grant credentials to such students.

Petitioner has omitted the title of said case while providing sufficient information to enable a research attorney to locate it if necessary. The common law, although it forbids homosexuality, is equally adamant against the needless disclosure that a person has engaged in such conduct, since such disclosure could handicap the person if he wished to discontinue the conduct. It appears that this teacher's probation officer and the Trial Court concluded that this was a case of that kind. Therefore, petitioner has endeavored to be as discreet as possible in providing this Court with information on that case, and hopes not to have to identify it further beyond stating that it was published in the official reports, which did not mention the fact that the defendant is a teacher and which omitted the Superior Court number. However, if the County Counsel disputes the truthfulness of this information petitioner can supply proof.

The retention of this teacher in his present employment is permitted by Education Code Section 24306 which, while it authorizes dismissal from such employment of anyone who has engaged in immoral conduct or been convicted of a crime involving moral turpitude, does not require this. Although at first glance the California Education Code seems to contain strict provisions against the employment of teachers convicted of sex offenses, these provisions apply only at the lower educational levels (Sections 13255, 24301 et seq.) and contain inconspicuous loopholes. Thus, if a teacher is charged with a crime entailing automatic dismissal he may arrange a plea bargain under which the original charge is dropped and he is convicted of some violation which does not bar a school district from employing the teacher if it chooses. Similar provisions enable such a teacher to retain his credential. These provisions are discussed by the court in *Pettit v. State Board of Education* (1973) 10 Cal. 3d 29, 31, 33 as follows: "Plaintiff was subsequently arrested and charged with violating Penal Code Section 288a (oral copulation). Evidently a plea bargain was arranged and plaintiff pleaded guilty to violating Penal Code Section 650½ (outraging public decency), a misdemeanor. . . . Therefore, revocation of plaintiff's credential cannot be had solely because of the conviction . . ."

School authorities seem to agree that the employment of a teacher so convicted is practicable only if the conviction is not generally known. Thus, in *Pettit* a decision by the Court of Appeal per Justice Cobey,

later vacated by the State Supreme Court, ordering reinstatement of the credential was accompanied by instructions that it not be published in the official reports. It is petitioner's contention that the State Board of Education has falsely invoked such a mantle of secrecy in order to conceal the fact that it has been treating acquittals of such charges as though they were indistinguishable from convictions, and that, to avoid alerting the public, it is seeking to "legalize" its policy through judicial decisions rather than legislative confrontation.

This procedure seems intended to culminate in the creation of a secret super judicial authority within the public school system. With respect to the employment rights of teachers, this authority is to have the power to reverse acquittals as well as convictions and to dismiss teachers on charges of homosexuality without the charges ever having been brought through criminal process.

Recognizing that the public would not agree to this, the proponents expect to accomplish it by obtaining legislation which on its face may seem to say just the opposite of what the proponents intend, but which contains a hidden meaning to be brought out later through an appellate decision. More specifically, the proponents have been attempting to pass additions to the Education Code which, while seemingly intended only to expand the discretion of the school authorities to employ teachers convicted of sex offenses, contain "jokers and fine print" which the Court of Appeal can in-

terpret as authorizing the school authorities to dismiss a teacher even when he has been fully acquitted of such an offense. An example of this is 1973 California Assembly Bill No. 1522, which provided as follows:

> "Notwithstanding Sections 13206 and 13207, the Committee of Credentials may in its discretion grant a meeting or hearing at any time under the provisions of Section 13121 to consider the status of any credential. In the event a determination is made which adversely affects the status of a credential holder, the credential holder may request a hearing under the provisions of Section 13121.2. As a result of this hearing, the commission may in its discretion deny, suspend, or revoke such credential, or issue, reinstate or continue in effect such credential."

Sections 13206[4] and 13207[5] automatically revoke the credentials of any teacher finally convicted of certain crimes. Therefore, Assembly Bill No. 1522 seemed intended to enable the Commission to permit a teacher so convicted to retain his credential if the offense was mitigated. However, Section 13207 also requires the restoration of any credential which has been suspended as a result of a sex conviction if the conviction is re-

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[4]"Upon the becoming final of the conviction of the holder of any credential * * * issued by the State Board of Education *or the Commission for Teacher Preparation and Licensing* of a violation, or attempted violation, of any one or more of Penal Code Section 187 to 191, 192 insofar as said action relates to voluntary manslaughter, 193, 194 * * * *to* 232, both inclusive, 244, 245, 261 to 267, both inclusive, 273a, 273f, 273g, 278, 285 to 288a, both inclusive, 424, 425, 484 to 488, both inclusive, insofar as said sections relate to felony conviction, 503 and 504, or of Penal Code Section 272, the * * * *commission* shall forthwith revoke the credential * * *."

[5]See footnote 1.

versed and the holder is acquitted. Thus, the Bill constituted a "joker" whereby the Court of Appeal could rule that the Commission had discretion as to whether or not to restore a teacher's credential even if he was acquitted.

The same hidden purpose is reflected by the Opinion herein by Justice Cobey and the Opinion by Justice Lillie in the accompanying appeal. While these decisions claim that, where a teacher is acquitted of a sex charge, his school board is entitled to institute a proceeding to dismiss the teacher if the board concludes the acquittal is not sustained by a preponderance of the evidence, these Opinions also represent that the institution of such proceeding is *optional* with the school board.

In determining the legislative intent in enacting Education Code Section 13409, Justice Lillie did not have to "assume" what the legislators meant. She had only to consult the *1955 Regular Session Summary Digest,* in which Assembly Bill No. 3232, which later became Section 13409, is analyzed as follows:

> "Requires governing board of school district to place on compulsory leave any such employee charged with committing any sex offense as defined for period not exceeding 10 days after decision in proceedings, or beyond such period if notice of dismissal is given within 10 day period. Authorizes such employee to give bond or other acceptable security, and receive payment of salary during such leave. Requires payment of employee's

salary during leave if acquitted and returns to service."

Similarly, the explanatory caption over Section 13409 in *West's Annotated Codes* does not say anything about the employee's salary on acquittal being subject to a retrial of the acquitted charge at the option of the school board. It says only: "Compulsory leave of absence on charge of sex offense and narcotics offenses; effect on salary of acquittal."

The background of *Governing Board v. Metcalf* (1974) 36 Cal. App. 3d 546, which is cited in the nonreemployment Opinion, suggests that the litigation was engineered to create a case for the argument that acquittal or dismissal of a sex charge against a teacher does not mean he was innocent in a factual sense. If petitioner's theory is correct, the first step in this engineering was the enactment in 1969 of California Penal Code Section 653n.[6] This section made it a misdemeanor to maintain a two-way mirror in the rest-

[6]"Any person who installs or who maintains after April 1, 1970, any two-way mirror permitting observation of any restroom, toilet, bathroom, washroom, shower, locker room, fitting room, motel room, or hotel room, is guilty of a misdemeanor.

This section does not apply to such areas (a) state or local public penal correctional, custodial, or medical institutions which are used by, or for the treatment of, persons who are committed or voluntarily confined to such institutions or voluntarily receive treatment therein; (b) in private custodial or medical institutions, which are used by, or for the treatment of, persons who are committed or voluntarily confined to such institutions or voluntarily receive treatment therein; (c) in public or private treatment facilities which are used by, or for the treatment of, persons who are committed or voluntarily confined to such facilities or voluntarily receive treatment therein; (d) in buildings operated by state or local law enforcement agencies; or (e) in public or private educational institutions:

"Two-way mirror" as used in this section means a mirror or other surface which permits any person on one side thereof to see through it under certain conditions of lighting, while any person on the other side thereof or other surface at that time can see only the usual mirror or other surface reflection."

room of any public building with the strange exception of school buildings among other exceptions. A policeman reading the statute would understand it to forbid the use in restrooms of only this particular surveillance device but not any other surveillance device. However, when a suitably employed teacher was convicted of a restroom offense on evidence obtained by hidden surveillance the District Attorney would encourage an appeal. The Court of Appeal would then rule that Section 653n indicated a legislative intent to forbid all hidden surveillance. On that ground it would reverse the conviction and the case would be dismissed. When the teacher tried to resume his employment the County Counsel would see that the school board resisted this through an action in the Superior Court to dismiss the teacher. The teacher would try to plead the criminal dismissal, but the County Counsel would argue that illegal search was inapplicable to an administratiev proceeding and that, therefore, the factual offense could be retried. Judgment would be for the school board and the teacher would appeal. The Court of Appeal would use the appeal to enunciate case law purportedly authorizing school boards to bring homosexuality charges against teachers independently of criminal convictions. Now that the Court of Appeal's surprise interpretation of Penal Code Section 653n had served its purpose, the Court would issue another Opinion stating that it had been mistaken in this interpretation, that all the legislators really meant to forbid was two-way mirrors but not any other means of hidden surveillance.

Whether petitioner's theory be termed Machiavellian or whether it be compared with the logic of a Rube Goldberg cartoon, petitioner submits that the history of *People v. Metcalf* (1971) 22 Cal. App. 3d 20, is not susceptible of a rational explanation without attributing to the District Attorney and the Court of Appeal some such chicanery as suggested above.

In *Metcalf* the defendant, a 26 year old probationary teacher in the public schools, had been arrested with a codefendant on a charge of oral copulation in a doorless toilet stall in the restroom of a May Company department store. A Los Angeles policeman had observed probable cause for the arrest from a concealed observation point, i.e., from behind a door leading into the restroom. This was subsequent to the enactment of the two-way mirror statute, but at the time repeated decisions by the Court of Appeal for the Second District had held that hidden surveillance of a restroom by a police officer was proper so long as the surveillance point did not afford a view that would be unavailable to anyone who simply walked into the restroom.

Although the bail for Metcalf's codefendant was set at the usual amount of $625, for Metcalf himself it was set without explanation at four times that amount. He spent several days in jail before he could raise the $2500. It appears that the District Attorney then offered to limit the penalty to a $125 fine, five percent of the amount of the bail, if Metcalf would agree to submit the case on the preliminary hearing transcript with the understanding that he would be found guilty

of a lesser offense. Metcalf agreed, but the lesser offense offered by the District Attorney was not one that was included in the original charge or the alleged facts on which it was based.

It is elementary law that any conviction for a violation not included in the original charge or facts thereof is reversible. Thus it would seem that the District Attorney not only wished to high pressure the defendant into accepting a plea bargain, but also wished to encourage an appeal and make doubly sure that the conviction would be reversed. The records indicate that the District Attorney had been informed Metcalf was a teacher, and it would not require much prescience to anticipate that on dismissal of the criminal charge Metcalf would try to regain his teaching job.

The defendants were convicted of the lesser offense and Metcalf appealed. The Court of Appeal reversed the conviction on the ground that the two-way mirror statute showed a legislative intent to forbid hidden surveillance of restrooms. The case was dismissed and Metcalf attempted to return to his teaching job. His school district resisted this on the ground that the offense had been proved in a factual sense. The charge was retried in a civil dismissal proceeding in which Metcalf's attorney tried to have the evidence of the offense excluded on the ground of illegal search. The trial court refused to exclude the evidence and judgment was for the school district on the ground that the offense had occurred. Metcalf's attorney appealed, again on the ground of illegal search. The Court of

Appeal, per Justice Cobey, ruled that illegal search did not apply to administrative proceedings against teachers on charges of immoral conduct. (*Governing Board v. Metcalf* (1974) 36 Cal. App. 3d 546 *supra*) This was accommodated by the provision in the two-way mirror statute exempting school restrooms from its prohibition. While this was being accomplished the Court of Appeal filed an Opinion in a different rest-room arrest case stating that its Opinion in the *Metcalf* criminal appeal had been wrong, that is, that Section 653n did not express a legislative intent against secret surveillance of restrooms; that it just meant the Legislature did not want two-way mirrors used in such surveillance. This Opinion, which was concurred in by Justice Cobey, does not appear in the final reports, but was published in the advance reports as *People v. Triggs,* 26 Cal. App. 3d 381.

The upshot of these legislative and judicial billiard shots is case law whereby a teacher charged with a homosexual offense under circumstances like those of petitioner's arrest could be tried in an administrative proceeding without a criminal complaint and without the necessity of evidence sufficient to justify such a complaint. He would have to defend against the charge at his own expense with the knowledge that, because of the statute authored by Justice Cobey, he would not be compensated even if the charge were brought "maliciously and without probable cause."

Under California Assembly Bill No. 3057, introduced during the 1974 session, a charge of this kind

could be brought independently of the criminal process against a college student of, say, 21 years, who was preparing for the teaching profession and who ordinarily would not have the resources to defend against the charge. The Bill provides, in revelant part:

> "As a prerequisite to commencing student teaching as a part of an approved teacher preparation program, potential teacher candidates must obtain a fieldwork certificate from the Commission for Teacher Preparation and Licensing which shall be issued when the commission is satisfied that the candidate's health and *moral character* are such as to subsequently qualifiy the candidate for a credential." (emphasis added)

In the *Metcalf* criminal appeal, the following example of the legal workmanship of the Justices bespeaks, by its amateurishness and brazen contempt for the law, a mentality consistent with the motives petitioner has attributed to the Justices:

In addition to the $125 fine assessed against Metcalf, he was placed on six months summary probation. Metcalf paid the fine the same day as the sentence, at which time the judge terminated the summary probation, "vacated" the conviction and entered a technical "dismissal." This was pursuant to California Penal Code Sections 1203.3 and 1203.4. While it did not actually vacate the conviction, it was in the nature of a certificate of rehabilitation.

When Metcalf appealed, the Attorney General, by

then Evelle Younger, advised the Court of Appeal in a letter dated September 30, 1971, that because of the proceedings under Sections 1203.3 and 1203.4 there was no longer a judgment of conviction to appeal from. The Justices then dismissed the appeal on the ground that the conviction as modified had so few damaging effects on the defendant as to mean almost the same as an acquittal. This Opinion does not appear in the final reports but was published in the advance reports as *People v. Metcalf,* 20 Cal. App. 3d 512. A copy is attached hereto as Appendix L.

The Opinion insults not only the intelligence of the defense attorney but also the person of the attorney's client whom the Opinion describes as not being in a position "of moral innocence disclaiming the acts he was charged with having committed in a men's room in a May Company department store."

This decision has the earmarks of being a dilatory tactic filed with the expectation that the defense attorney would successfully petition the State Supreme Court to overturn it, as indeed he did. As to why the Justices would at that point want to delay the reversal they subsequtntly filed, petitioner can only offer more theory.

Whatever the Justices had in mind, petitioner submits that this Opinion reflects an intent to use the opprobrium of a restroom arrest to conceal an attack on the public's rights. Admittedly, such a scheme would not be joined in by anyone of mature aspirations. However, the Opinion displays a naivety that makes it in-

congruous to attribute much sophistication to the authors.

It is petitioner's theory that Evelle Younger is a major executive in this scheme, and that the real reasons for the teacher dismissal proceedings against petitioner are as follows: The acquittal placed Mr. Younger in a vulnerable position because of the suspicious circumstances which attended the destruction of the stall partitions. The County Counsel, Justice Lillie and Justice Cobey rallied around Mr. Younger in an attempt to make it appear that the acquittal was based merely on some doubt or technicality and that in actuality the charge was true. This they thought would undermine any complaint concerning the destruction of evidence. At the time the Justices thought Mr. Younger would be the next Governor of California, and that he could advance them politically. Attached hereto as Appendix M is a copy of an item in the Van Nuys (California) News of January 10, 1974, in which Mr. Younger is reported to have told Justice Lillie she would be his first appointment to the State Supreme Court on becoming Governor. The evidence presented by Mr. Rummler was to be discredited by making him appear to be some kind of affectionate nut with a sympathy for restroom romances and a feeling of that kind toward petitioner.

Therefore, at the non-reemployment hearing Mr. Wagner questioned Mr. Rummler as to whether he had ever stayed overnight with petitioner, and stated that

Mr. Rummler was very biased against policemen.[7] (Transcript No. OLA 26018, page 141, lines 5-16; page 145, lines 17-27) Later, in a court proceeding having no relation to the teacher dismissal actions, Mr. Wagner testified as follows:

> Q. BY MR. RUMMLER: Mr. Wagner, do you consider me an honest man?
>
> A. No, I do not.
>
> Q. Is your opinion based in part on a complaint I made against you with regard to a certain transcript?
>
> A. In part.
>
> Q. I see.
>
> A. It's not the fact that you made the complaint, Mr. Rummler. The complaint was investigated in regard to some activity — in regard — what you allege I did wrong in my position. And you were answered, you were given an answer, an official answer in regard to that. And you continued, if you would, after you knew the answer to that situation, to attempt to assail my character, to attempt to undermine my credibility and my functioning as an attorney in this community. That's, sir, why I consider you dishonest, because you knew the answer to an inquiry. And after you knew that answer, you continued to attempt, if you would, to destroy my reputation in the community

[7]Petitioner's attorney at the criminal trial was a former policeman, as was the jury foreman. The background of petitioner's trial attorney, now Judge Mario Gonzalez, is contained in LBS California Courts and Judges Handbook, Second Edition 493.

because, sir, because I was instrumental in performing my job —

Q. Just a moment. Just one moment.

A. May I answer?

THE COURT: You've asked for this, Mr. Rummler. Go ahead. Continue.

THE WITNESS: Because I was instrumental in the performance of my job as a Deputy County Counsel in putting on a trial which involved your roommate, Mr. Calderon, in which he was found guilty, if you would, as far as his teaching profession is concerned, of having orally copulated —

THE COURT: Just a moment. There's no necessity for bringing that out, sir. What the charge might have been.

THE WITNESS: Your Honor, this is the reason that I feel he's dishonest.

THE COURT: Well, that's all right. You can explain all of that, sir. But there's no necessity for going into the details of what the lawsuit might have been. Anything the witness has said in that regard is stricken and the jury is admonished to diregard it in its entirety.

This testimony is contained in the Court Reporter's Transcript of People of the State of California vs. Wyn Rummler No. A-122256, page 968, line 4 to page 969, line 17, which will be lodged with this Court on request. The proceedings evolved from charges brought by the Los Angeles County District Attorney against Mr. Rummler during the criminal proceedings against

petitioner, after Mr. Rummler had informed the District Attorney of the discrepancy between the security agents' testimony and the restroom structure. One of the counts alleged grand theft, and Mr. Rummler had subpenaed Mr. Wagner as a hostile character witness.

Prior to subpenaing Mr. Wagner, Mr. Rummler had arranged that all further papers filed by petitioner in the teacher dismissal actions would come from Mr. Rummler's home address. Mr. Rummler signed all the mailing declarations on papers served on the County Counsel, and gave the same address. This strategy was inspired by Mr. Wagner's questioning at the non-reemployment hearing. Mr. Rummler defended against the grand theft charge in propria persona, and in questioning Mr. Wagner seemed to be trying to avoid mention of the oral copulation charge while actually giving Mr. Wagner an opportunity to bring it in himself.

Thereby a clear record was obtained of the County Counsel using the teacher dismissal proceeding, not to "shield children of tender years," but to cause damage to petitioner's defense investigator.

Incidentally, Mr. Rummler was acquitted of the theft charge, a fact which suggests that the jury at least thought there was a reasonable doubt that Mr. Wagner's opinion of the defense investigator was correct.[8]

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[8]Petitioner has been requested by Mr. Rummler to emphasize that none of the foregoing implies anything discreditable concerning the Honorable Roy M. Carstairs, who admirably presented the People's case in the proceeding to which Mr. Wagner was subpenaed.

REASONS FOR GRANTING THE WRIT

During Evelle Younger's tenure as a prosecutor for the State, first as Los Angeles County District Attorney, then as Attorney General, actions by the State Supreme Court and the Court of Appeal for the Second District have been repeatedly consistent with collusion in the enactment of de facto statutes without the knowledge and consent of the governed.

These actions are consistent with a technique whereby the Attorney General, as lobbyist for an unConstitutional regulation, induces the Legislature to pass a law which on its face may seem to say just the opposite of what the proponents intend, but which contains a hidden meaning that will be brought out later through an appellate decision. After the law is passed the Attorney General, the Los Angeles County District Attorney or the Los Angeles County Counsel applies the law against some private citizen in accordance with its concealed unConstitutional purpose. If the private citizen protests this application in the courts and the case reaches the Court of Appeal for the Second District, the State agency's interpretation of the law is upheld. Any appeal by the citizen to the State Supreme Court is denied without a hearing. Thereby the hidden meaning of the law becomes a de facto statute. Often the Court of Appeal's decision is accompanied by instructions that it not be published. Members of the legal profession nevertheless hear about the decision and abide by it. Protests to the Legislature about this practice are ignored or sidetracked. Attempts to inform

the public of this situation through the major press facilities have also proved ineffectual. Thereby a body of unConstitutional law has been created which does not appear in the code books and which is shielded from the corrective effect of public opinion by the fact that the public is unaware of it.

This practice has become so persuasive in California as to take on the proportions of an internal attack on the Constitutional Government.

The Opinion in the non-reemployment proceeding furnishes an example of the calculated reading into statutes of meanings that the Legislature could not possibly have intended. Self-evidently, Education Code Section 13443 can only cancel future employment; it does not terminate present employment. Obviously, therefore, it has no application to causes that require immediate dismissal under Education Code Section 13255. Hence, Justice Cobey's interpretation of this section as authorizing the trial of an infamous felony sex charge goes far beyond anything one can "reasonably assume" he actually understood the section to mean.

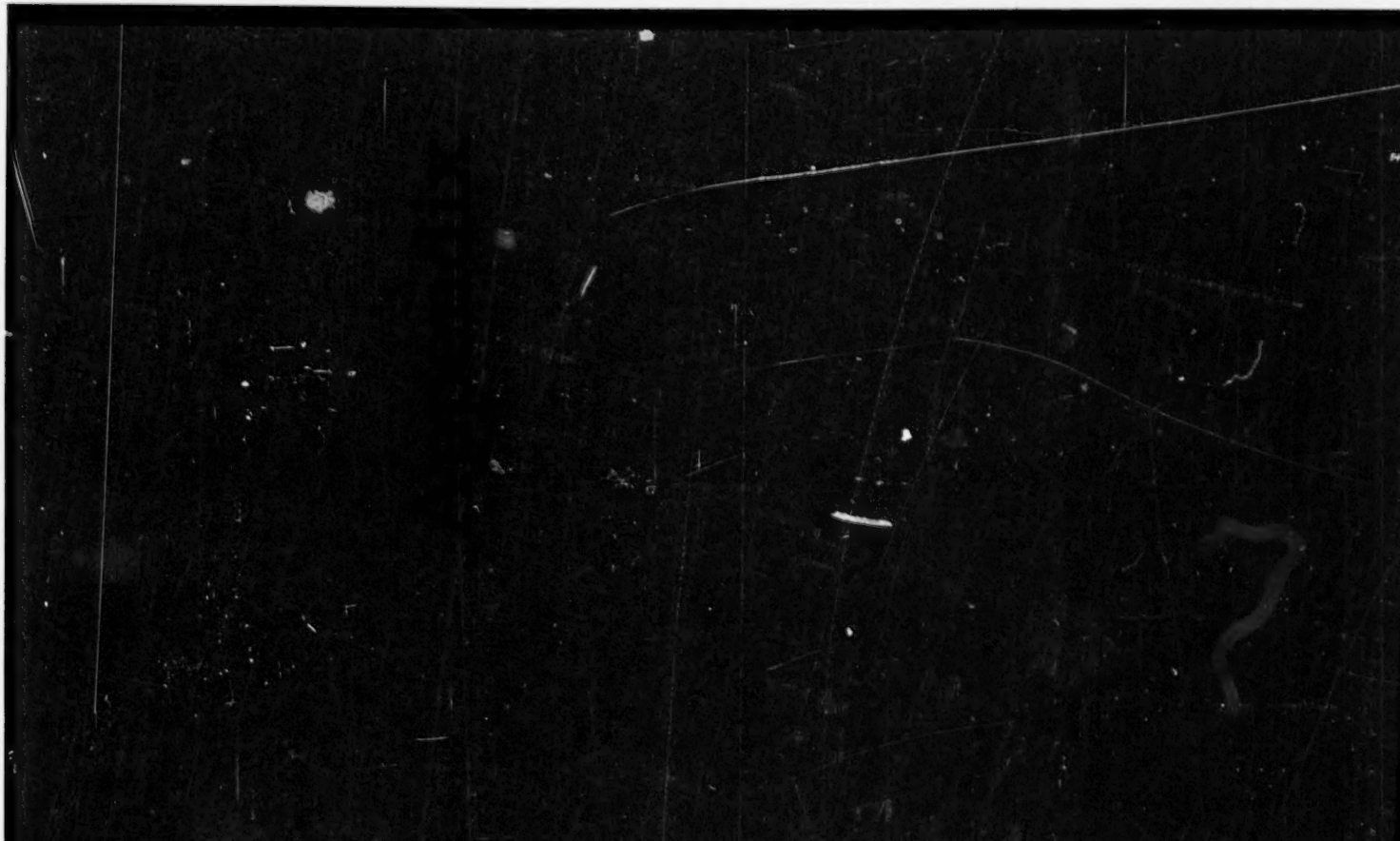
In flouting the Federal rule of collateral estoppel the decision does not "protect school children." It appears to utilize petitioner's case in a scheme to defraud the United States. Therefor, this case merits certiorari, not only as a violation of petitioner's rights under the Federal Constitution, but also as an opportunity to bring the problem of secret legislation per judiciary into public view.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the Judgment and Opinion of the Court of Appeal of California, Second Appellate District.

Respectfully submitted,

MARCUS MORALES CALDERON,
In Propria Persona.



APPENDIX A

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MARCUS MORALES CALDERON, Plaintiff and Appellant, vs. BOARD OF EDUCATION OF THE EL MONTE SCHOOL DISTRICT OF LOS ANGELES COUNTY, Defendant and Respondent.	2D CIV. NO. 40727 Sup. Ct. No. C 6214

[Filed Mar. 27, 1974, Court of Appeal - Second Dist. - Clay Robbins, Jr., Clerk.]

APPEAL from a Judgment of the Superior Court of Los Angeles County. Robert A. Wenke, Judge. Affirmed.

Marcus Morales Calderon, Plaintiff and Appellant, in propria persona.

John D. Maharg, County Counsel (Los Angeles County), and John J. Wagner, Deputy County Counsel, for Defendant and Respondent.

Marcus Morales Calderon appeals from a judgment in administrative mandamus (Code Civ. Proc., §

1094.5) denying his petition for a writ to require respondent Board of Education of the El Monte School District (hereafter Board) to reemploy him for the next school year as a probationary certificated secondary teacher, and for related relief.

FACTS

On May 6, 1970, petitioner was arrested for violation of Penal Code section 288a, oral copulation. The following day, the Board placed petitioner on compulsory leave of absence, pursuant to Education Code, section 13409.[1] On March 10, 1971, petitioner was acquitted of the charge. The day before his acquittal, however, the Board informed him that pursuant to section 13443,[2] it had decided to not reemploy him for the next school year (1971-1972) on the ground of immoral conduct. Petitioner thereupon demanded the hearing before the Board to which he was entitled. (§ 13443, then subd. (c) - now subd. (b).)

On March 15, 1971, after his acquittal, petitioner notified the Board of his desire to resume immediately his teaching duties. The Board responded on March

[1]All sections cited hereafter are from the Education Code, unless otherwise stated.

[2]This section read in pertinent part:

"(a) [*Notice.*] On or before the 15th day of May in any year, the governing board may give notice in writing to a probationary employee that his services will not be required for the ensuing year, . . .

". . .

"(e) [*Dismissal for cause.*] The governing board's determination not to reemploy a probationary employee . . . shall be for cause only. The determination of the governing board . . . shall be conclusive, but the cause shall relate solely to the welfare of the school and the pupils thereof." (Stats. 1965, c. 1110, p. 2755.)

17 by informing him that pursuant to section 13409,[3] it intended to dismiss him, effective in 30 days, unless he requested judicial review, pursuant to section 13412.[4] Whereupon he demanded such review.

On April 16, 1971, the Board through a hearing officer, held a hearing to determine the propriety of its refusal to reemploy petitioner for the coming school year. Following the hearing the hearing officer found that petitioner had "engaged in sexual conduct with an adult male that was lewd, indecent, and dissolute," and that the conduct involved moral turpitude. The hearing officer concluded that the conduct related to the welfare of the schools and pupils thereof. The Board adopted this decision as its own. Petitioner then initiated the mandamus proceeding before us. On August 30, 1971, the court denied his petition.

Concurrently with the foregoing activities, the decision of the Board to dismiss petitioner was litigated.[5]

---

[3]This section then read in pertinent part:

"The governing board of the school district may extend the compulsory leave of absence of the employee . . . by giving notice to the employee within 10 days after the entry of judgment in the proceedings that the employee will be dismissed at the expiration of 30 days . . . , unless the employee demands a hearing . . ." (Stats. 1959, c. 2, p. 943.)

[4]This section then read in pertinent part:

"When any employee who has been served with notice of the governing board's intention to dismiss him demands a hearing, the governing board shall . . . file a complaint in the superior court of the county . . . , setting forth the charges against the employee and asking that the court inquire into the charges against the employee and asking that charges are true, and if true whether or not they constitute sufficient grounds for the dismissal of the employee. . . ." (Stats. 1959, c. 2, p. 944.)

[5]The distinction between the two disciplinary procedures is small and subtle. The Board's decision to not reemploy petitioner (the case at bar) involved his right to teach in the school district for the school year of 1971-1972. The Board's decision to dismiss him, on the other hand, involved, among other things, his right to complete his contract to teach the 1970-1971 year. Presumably, a person so dismissed would have no right to teach in any subsequent year.

In that case the trial court specifically found that petitioner had engaged in an act of oral copulation. It concluded that such action constituted immoral conduct and that sufficient grounds existed for petitioner's dismissal. (*Board of Education v. Calderon*, 35 Cal.App.3d 490, 492-493.) Petitioner appealed the ruling, and on November 20, 1973, Division One of this district of this statewide court filed its decision affirming the trial court's judgment. (*Id.*, p. 497.) The remittitur in that case having issued, the appellate judgment thereon is now final. (Cal. Rules of Court, Rule 25, subd. (a).)

DISCUSSION[6]

Petitioner's first contention is that the Board could not properly refuse to reemploy him pursuant to section 13443. He argues that the Legislature intended this statute to be used only in cases involving relatively minor offenses, and that where, as here, a teacher is charged with an offense listed in either section 13403 or section 13408,[7] section 13443 is inapplicable.

This contention is without merit. Contrary to petitioner's contention, section 13443 *has* been applied

---

[6]It is tempting to treat the case as moot, in light of the decision of our sister court. We do not believe that the case is moot, however. A case is moot if, and only if, the decision would be of only academic or abstract interest, and would be of no practical significance to the parties. (See 6 Witkin, Cal. Procedure (2d ed. 1971) § 462, p. 4418.) A decision of this case in favor of petitioner would not have this result.

[7]Among the offenses listed in section 13403 are: immoral or unprofessional conduct; commission, aiding, or advocating the commission of acts of criminal syndicalism; dishonesty; and conviction of a felony involving moral turpitude.

Section 13408 includes other offenses, such a incompetency due to mental disability.

in the past to cases involving charges listed in section 13403. (*Governing Board v. Brennan,* 18 Cal.App.3d 396 [immoral conduct]; *Lunderville v. Emery Unified Sch. Dist.,* 262 Cal.App.2d 459 [unprofessional conduct].) It is true, as petitioner argues, that a school board may, pursuant to this statute, fail to reemploy a probationary teacher for *less* serious offenses than are involved in the two sections. (See, e.g., *McGlone v. Mt. Diablo Unified ch. Dist.,* 3 Cal.App.3d 17 [inefficiency, etc.].) We see nothing, however, nor has petitioner pointed to anything, in either the language of the statute or in logic which would indicate that the holdings of these cases are wrong, and that a district may not act under section 13443 to refuse to reemploy a probationary teacher when a charge listed in section 13403 or section 13408 is involved.

Petitioner next contends that since he was acquitted of oral copulation in a prior criminal proceeding, the Board was collaterally estopped from then using the charge of oral copulation as the basis for a subsequent administrative disciplinary proceeding against him.[8]

This contention is also without merit. As the burden of proof in a criminal case is greater than that in a civil action, the doctrine of res judicata — and its

---

[8]Petitioner also contends that a teacher may not be dismissed pursuant to section 13409 when the teacher has been previously acquitted of the same criminal charge. This contention is not properly before us. Section 13409 was relevant to the school board's decision to dismiss him. It is not involved in this proceeding challenging the propriety of the Board's decision not to reemploy petitioner.

derivative collateral estoppel — may not normally be applied in a civil action subsequent to an acquittal in a criminal action. (*Gibson v. Gibson,* 15 Cal.App.3d 943, 946-947; see *Helvering v. Mitchell* (1938) 303 U.S. 391, 397 [82 L.Ed. 917, 920].) The only exception is that when the purpose of a civil action is primarily to punish the defendant, and is not intended to be remedial, the doctrines of res judicata and collateral estoppel are applicable after a criminal acquittal. (*Coffey v. United States* (1886) 116 U.S. 436, 443 [29 L.Ed. 684, 687]; see *Murphy v. United States* (1926) 272 U.S. 630, 632 [71 L.Ed. 446, 451]; see *McKeehan v. United States* (6th Cir. 1971) 438 F.2d 739, 746 [concurring opinion of Circuit Judge Weick].) Despite its punitive effect, the primary purpose of the type of discipline involved herein, however, is not to punish the teacher, but is rather to protect school children. (*Governing Board v. Metcalf,* 36 Cal.App.3d 546, 551; *Borror v. Department of Investment,* 15 Cal.App.3d 531, 540.) The *Coffey* exception is therefore inapplicable to the instant case and collateral estoppel may not be applied. (*Board of Education v. Calderon, supra,* 35 Cal.App.3d 490, 496; *Bold v. Board of Medical Examiners,* 135 Cal.App. 29, 33-35.)

Petitioner's final contention is that there is insubstantial evidence from which to conclude that he is unfit to teach. One cannot be deprived of nne's teaching position because of immoral conduct, unless it also be shown that because of it the teacher is unfit to teach. (*Pettit v. State Board of Education,* 10 Cal.3d

29, 34; *Morrison v. State Board of Education,* 1 Cal. 3d 214, 229.)

This contention may be dealt with summarily. The trial court, in the action by the school board to dismiss petitioner, found that petitioner did commit an act of oral copulation, that he was guilty of immoral conduct and that there were sufficient grounds for his dismissal. As stated earlier, the appellate judgment in that case, affirming the trial court's judgment, is now final. The latter judgment is therefore now binding upon us and operates as a conclusive adjudication of all matters raised or which might have been raised in that case. (*Taylor v. Hawkinson,* 47 Cal.2d 893, 895-896; *Price v. Sixth District Agricultural Assn.,* 201 Cal. 502, 511.) Petitioner is therefore collaterally estopped from arguing here that he did not engage in an act of oral copulation,[9] that he was not guilty of immoral conduct, or that sufficient grounds did not exist for his dismissal. Moreover, even if the issue of whether petitioner's immoral conduct constituted in itself sufficient evidence of his unfitness to teach (in light of *Morrison, supra,* and *Pettit, supra*) was not litigated in the dismissal case, petitioner is nonetheless estopped from now litigating that issue in this case in this court. The overall question of whether he was properly dismissed was litigated in the dismissal case. The *Morrison-Pettit* issue merely involved an-

[9]In the case at bar the hearing officer did not find that petitioner had engaged in an act of oral copulation. The superior court, however, did so find. It is now legally immaterial that the superior court's findings in this respect went beyond those of the hearing officer.

other *legal theory* by which the overall question might have been differently decided. Collateral estoppel therefore applies. (*Sutphin v. Speik,* 15 Cal.2d 195, 205.)

As the grounds for failing to reemploy petitioner are exactly the same as those upon which his dismissal was based, and as it has been conclusively found that these grounds were adequate for his dismissal, it follows that the same grounds afford an adequate basis for the Board's decision not to reemploy him. (See *Governing Board v. Brennan, supra,* 18 Cal.App. 3d 396, 403.)

It is unnecessary to discuss petitioner's remaining contentions. We have considered them and found them to be without merit in view of our holding that the Board was justifed in its decision not to reemploy petitioner.

The judgment is affirmed.

COBEY, J.

We concur:

FORD, P.J.

ALLPORT, J.

APPENDIX B

Order Due
May 24, 1974

ORDER DENYING HEARING AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 3, Civil No. 40727

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANK

CALDERON

v.

BOARD OF EDUCATION OF THE EL MONTE SCHOOL DISTRICT OF LOS ANGELES COUNTY

Appellant's petition for hearing DENIED.

[Filed May 22, 1974, Supreme Court, G. E. Bishel, Clerk].

I, G. E. BISHEL, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 9th day of July, A.D., 1974.

Clerk

By R. JOHNSON
Deputy Clerk

WRIGHT
Chief Justice

APPENDIX C

JOHN D. MAHARG, County Counsel
JOHN J. WAGNER, Deputy County Counsel
648 Hall of Administration
Los Angeles, California 90012
625-3611, Ext. 65291
Attorneys for Respondent

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

MARCUS MORALES CALDERON, Petitioner, vs. BOARD OF EDUCATION OF THE EL MONTE SCHOOL DISTRICT OF LOS ANGELES COUNTY, Respondent.	No. C 6214

JUDGMENT

The above-entitled case came on regularly for trial on August 30, 1971 in Department 65 of the above-entitled court, the Honorable Robert A. Wenke presiding; John D. Maharg, County Counsel by John J. Wagner, Deputy County Counsel, appearing as attorneys for Respondent and Marcus Morales Calderon appearing pro per.

Said case having been heard, the pleadings having been introduced by the parties, arguments of the Petitioner in pro per and of counsel having been heard

and said cause having been submitted for decision, the Court having rendered its decision in favor of Respondent and against the Petitioner;

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that:

1. The Writ of Mandamus prayed for herein be denied.
2. That the Petitioner take nothing by virtue of its action on file herein.
3. That the Respondent be awarded its costs.

DATED:.....

.....

ROBERT A. WENKE
Judge of the Superior Court

APPENDIX D

BEFORE THE BOARD OF EDUCATION
OF THE EL MONTE SCHOOL DISTRICT

In the Matter of the Accusation Against:	)	
	)	OLA
MARCUS MORALES CALDERON, Respondent.	)	26018

PROPOSED DECISION

This matter came on regularly for hearing before E. F. DeVilbiss, Hearing Officer of the Office of Administrative Procedure, at Los Angeles, California, on April 16, 1971, at the hour of 9:00 a.m. John J. Wagner, Deputy County Counsel, represented the Superintendent of the El Monte School District. Respondent appeared in person and was represented by James P. Collins, Jr., Attorney at Law. Evidence both oral and documentary was introduced and received, the matter was submitted and considered, and the Hearing Officer finds the following facts:

I

Respondent Marcus Morales Calderon is a third year probationary teacher of the El Monte School District.

II

On March 9, 1971, the Board of Education of the El Monte School District was given written notice pursuant to Education Code Section 13443 that it was recommended that respondent's services would not be required for the ensuing school year.

III

On March 9, 1971, respondent was given written notice pursuant to Education Code Section 13443 that it was recommended that his services would not be required for the ensuing school year.

IV

On March 15, 1971, respondent requested in writing a hearing to determine if there is cause for not reemploying him for the ensuing school year.

V

On May 6, 1970, in the men's room of Sierra Hall, a rest room of Los Angeles City College located at 855 North Vermont Avenue in the City of Los Angeles, the respondent engaged in sexual conduct with an adult male that was lewd, indecent and dissolute. The conduct involved was conduct involving moral turpitude.

VI

All allegations in the Accusation not found true are specifically herein not proved by a preponderance of convincing evidence and found to be untrue.

* * * * *

Pursuant to the foregoing findings of fact, the Hearing Officer makes the following determination of issues:

I

Respondent's conduct as set forth in finding V herein relates to the welfare of the school and the pupils thereof.

I hereby submit the foregoing which constitutes my Proposed Decision in the above-entitled matter, as a result of a hearing had before me on April 16, 1971, at Los Angeles, California, and recommend its adoption by the Board of Education of the El Monte School District.

E. F. DeVILBISS,
Hearing Officer

DATED: April 26, 1971

APPENDIX E

SECTION 13443 OF THE CALIFORNIA EDUCATION CODE

13443. Cause, notice and right to hearing required for dismissal of probationary employee.

(a) No later than March 15 and before an employee is given notice by the governing board that his services will not be required for the ensuing year, the governing board and the employee shall be given written notice by the superintendent of the district or his designee, or in the case of a district which has no superintendent by the clerk or secretary of the governing board, that it has been recommended that such notice be given to the employee, and stating the reasons therefor.

(b) The employee may request a hearing to determine if there is cause for not reemploying him for the ensuing year. A request for a hearing must be in writing and must be delivered to the person who sent the notice pursuant to subdivision (a), on or before a date specified therein, which shall not be less than seven days after the date on which the notice is served upon the employee. If an employee fails to request a hearing on or before the date specified, his failure to do so shall constitute his waiver of his right to a hearing. The notice provided for in subdivision (a) shall advise the employee of the provisions of this subdivision.

(c) In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part I of Division 3 of Title 2 of the Government Code and the governing board shall have all the power granted to an agency therein, except that:

(1) the respondent shall file his notice of defense, if any, within five days after service upon him of the accusation and he shall be notified of such five-day period for filing in the accusation;

(2) the discovery authorized by Section 11507.6 of the Government Code shall be available only if request is made therefor within 15 days after service of the accusation, and the notice required by Section 11505 of the Government Code shall so indicate; and

(3) the hearing shall be conducted by a hearing officer who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof, but the proposed decision shall not contain a determination as to the sufficiency of the cause or a recommendation as to disposition, which sufficiency and disposition shall be determined by the governing board. The proposed decision shall be submitted to the governing board on or be-

fore May 7 of the year in which the proceeding is commenced. All expenses of the hearing, including the cost of the hearing officer, shall be paid by the governing board from the district funds. The board may adopt from time to time such rules and procedures not inconsistent with provisions of this section, as may be necessary to effectuate this section.

(d) The governing board's determination not to reemploy a probationary employee for the ensuing school year shall be for cause only. The determination of the governing board as to the sufficiency of the cause pursuant to this section shall be conclusive, but the cause shall relate solely to the welfare of the schools and the pupils thereof and provided that cause shall include termination of services for the reasons specified in Section 13447. The decision made after the hearing shall be effective on May 15, of the year the proceeding is commenced.

(e) Notice to the probationary employee by the governing board that his service will not be required for the ensuing year, shall be given no later than May 15.

(f) If a governing board notifies a probationary employee that his services will not be required for the ensuing year, the board shall, within 10 days after delivery to it of the employee's written request, provide him with a statement of its reasons

for not reemploying him for the ensuing school year.

(g) Any notice or request shall be deemed sufficient when it is delivered in person to the employee to whom it is directed, or when it is deposited in the United States registered mail, postage prepaid and addressed to the last known address of the employee.

(h) In the event that the governing board does not give notice provided for in subdivision (e) of this section on or before May 15, the employee shall be deemed reemployed for the ensuing school year.

(i) If after request for hearing pursuant to subdivision (b) any continuance is granted pursuant to Government Code Section 11524, the dates prescribed in subdivisions (c), (d), (e) and (h) which occur on or after the date of granting the continuance shall be extended for a period of time equal to such continuance. (Amended by Stats 1969 ch 1315 1: Stats 1970 ch 273 1, ch 1565 2.)

APPENDIX F

IV

Defendant denies each and every allegation of Paragraph VII of the complaint, both generally and specifically, and the whole thereof.

AS A FURTHER AND SEPARATE DEFENSE defendant alleges as follows:

I

The charges contained in Exhibit "A" of the complaint are identical with the charge made against defendant in an action entitled People of the State of California vs Marcus Morales Calderon and Alex Dias, No. A 259427, charging violation of the Penal Code, Section 288a, a felony. Said charge was tried in the above entitled Court, and on March 10, 1971, defendant and Alex Dias were acquitted thereof by a jury. During the trial no allegations of immoral or unprofessional conduct were made against defendant other than said charge of violating Section 288a, and said acquittal is the entire judgment in said action.

II

On May 7, 1970, following defendant's arrest on said criminal charge, plaintiff placed defendant on compulsory leave of absence and notified defendant that said compulsory leave was to extend until 10 days after entry of judgment in said criminal proceedings. Plaintiff has paid no salary to defendant accrued since May 7, 1970. On or about March 15, 1971, defendant offered to return to service in the El Monte School District and requested payment of said salary, addressing said offer and request to the superintendent of said district.

III

On or about March 17, 1971, plaintiff, by his attorney, John J. Wagner of the County Counsel's Office, notified defendant that the within complaint would be based on the arrest report in said

criminal action.

IV

The charges contained in Exhibit "A" of the complaint are a verbatim repetition of charges contained in a prior action No. OLA 26018 between the same parties seeking dismissal of defendant from his same position in the same school district. On April 16, 1971, a hearing was held on said charges in the Office of Administrative Procedure. On April 26, 1971, in a proposed decision by the hearing officer, Allegation 1 of said charges (oral copulation) was found to be untrue, and Allegation 2 (conduct indicative of corruption, etc.) was found to be true. On April 28, 1971, plaintiff adopted said decision and dismissed defendant from his employment with the El Monte School District as of the end of the 1970 - 1971 school year.

V

The complaint is barred by United States and California law as to administrative process through the fact that at the time the complaint was filed defendant had already been dismissed by plaintiff as of the end of the 1970 - 1971 school year; by res judicata; by double jeopardy; and by the provisions of the Education Code, Sections 13403 and 13409.

VI

The codefendant in said criminal action, Alex Dias, is not now and has not at any time material herein ever been employed by plaintiff.

VII

The complaint is barred by the due process clauses of the United States and California Constitutions in that it proposes a trial in absentia of Alex Dias on the same charge of which he has already been acquitted by this court in said criminal action. The complaint is barred for the further reason that plaintiff has no jurisdiction under Sections 13403 and 13409 of the Education Code

APPENDIX G

Harold Cole, Campus Police
Los Angeles City College

September 1, 1970

Sir:

A subpoena has been filed to obtain your appearance in Superior Court Dept. 114, 313 N. Main St., Los Angeles, Sept. 3, 1970 at 9:00 A.M., as a witness in the criminal action entitled People v Marcos Morales Calderon and Alex Diaz No. A 250427. The reasons for the subpoena are explained in a letter mailed to you on August 24, 1970. If, as I suspect, the subpoena has not been delivered and you do not recall receiving the letter, I hereby request you to appear voluntarily for the reasons outlined below.

On the back of this sheet is a xerox from the transcript of the preliminary hearing of said action, showing as underlined that your subordinate, Gary W. Dayton, testified that the bottoms of the toilet stall partitions in Sierra Hall men's room are 18 inches from the floor. Later in the hearing he testified that by means of this 18 inch space he saw Calderon's and Diaz's legs from the knee down so positioned as to incriminate them in a violation of Section 288a PC.

If you do not already know that the bottoms of the stall partitions are much lower than Dayton claims, and therefore that it is impossible for him to have seen the defendants' legs positioned as he says, a visit to the restroom will show you that none of the partitions is more that eight and one fourth inches from the floor, and that most of the outermost partition is only four and three fourths inches from the floor. The purpose of the subpoena is in order that you may inform the court of that fact.

Since Dayton is under your direction and responsibility, if you fail to appear and correct his statements you will be liable in due course for certain actions based on an issue of whether you have sufficient sense of citizenship and professionalism for your position as head of the campus police. The same is true if you do show up but are not prepared to testify competently as to the actual distance between the bottoms of the stall partitions and the floor. Placing this information before the court is the only purpose of the subpoena.

To lessen any tendency of this communication to get lost before you see it, I might add that I'm no novice at making this kind of delivery, so that there is no reasonable doubt of my being able to establish the fact that you received it.

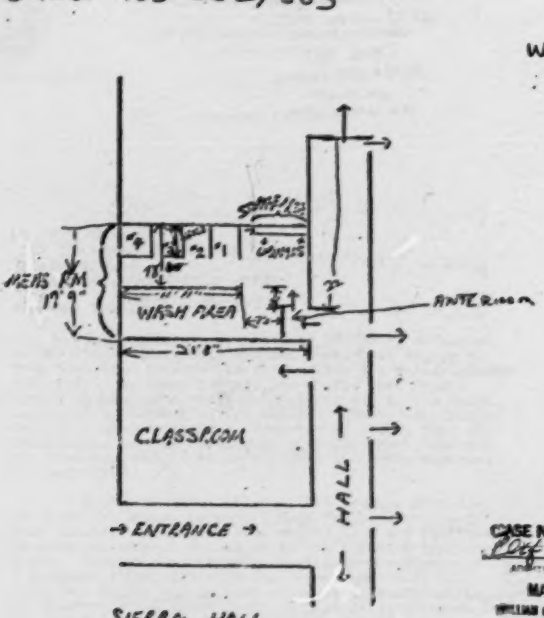
Yours truly,

Sept. 1, 1970 2 P.M.
Interviewed Steiner,
DR.

Wyn Rossler
1522 N. Mariposa Ave.
Los Angeles 90027

APPENDIX H

(1) BK NO. 483 862/863



CASE NO. NEC 1683
Pltf EXHIBIT 1
ADMITTED IN EVIDENCE
MAR 6 - 1972
WILLIAM C. SHARP, County Clerk
BY R. MARIELLO, DEPUTY

"SKETCH OF THE MENS ROOMS IN SIERRA HALL"

THE HOLE MENTIONED IN THE MAGAZINES:

25 3/4" FROM FLOOR UP
3" IN DIAMETER
3 1/2" VERTICALLY
29 1/2" FROM FRONT OF STALL
30 1/2" FROM THE BACK WALL

CASE NO. NEC-10832
EXHIBIT 2
ADMITTED IN EVIDENCE
APR 5 1972
WILLIAM G. SHARP, County Clerk
BY R. MARINELLO, DEPUTY

Partition: Door 9 feet 2"
WALL TO FRONT OF PARTITION 60"
WALL TO WALL COMMON AREA 7'7 8"
WALL TO OPEN END OF COMMON AREA 11' 11"
WASH ROOM WALL TO WALL (East) 21' 8"
" " WALL TO WALL (West) 17' 9"

PARTIAL WASH AREA WALL TO
ANTI ROOM 4' SOUTH

WASH AREA PARTIAL WALL TO
ANTI ROOM PARTION 7'5" EAST

APPENDIX I

COUNTY OF LOS ANGELES
OFFICE OF THE COUNTY COUNSEL
648 HALL OF ADMINISTRATION
LOS ANGELES, CALIFORNIA 90012
MADISON 5-961

JOHN H. HARLEY COUNTY COUNSEL

February 14, 1972

Mr. Wyn Rumler
1522 North Mariposa Avenue
Apartment #107
Los Angeles, California 90027

Dear Mr. Rumler:

Your letters dated January 28, 1972, addressed to Supervisor Warren M. Dorn and Supervisor Ernest E. Debs have been referred to this office for investigation and reply. In these letters you charge that Deputy County Counsel John Wagner misrepresented to the Court, during an appearance before Superior Court Judge Gerald Malkan in Department 63 on November 18, 1971, that he had filed a certain transcript with the Court, whereas you have been unable to verify that the transcript was in fact filed.

As the Division Chief of the Schools Division, in which Mr. Wagner serves, I have fully investigated your charge. It does in fact appear that the transcript in question cannot be located in the files of the Court Clerk. However, as indicated in the attached copy of a document filed with that Court dated November 8, 1971, Mr. Wagner had in fact caused the transcript to be filed with the Court Clerk on that date, November 8th. Mr. Wagner's secretary verifies that she did in fact file the transcript with the original of the attached document.

It thus appears that Mr. Wagner did in no way make a misrepresentation to the Court on November 18th

and that this matter was probably occasioned by a misfiling of the transcript in the Court Clerk's office.

Very truly yours,

JOHN D. MAHARG
County Counsel

By James W. Briggs
JAMES W. BRIGGS
Division Chief
Schools Division

JWB:hk

Attachment

cc: Supervisor Warren M. Dorn
Supervisor Ernest E. Debs
Supervisor Frank G. Bonelli
Supervisor Kenneth Hahn
Supervisor Burton W. Chace
John D. Maharg

APPENDIX J

NAME, ADDRESS, AND TELEPHONE NUMBER OF ATTORNEY

JOHN H. LARSON, County Counsel
JOHN J. WAGNER, Deputy County Counsel
606 Hall of Administration
Los Angeles, California 90012
(213) 974-1416

DUPLICATE

ATTORNEY FOR: Plaintiff and Respondent

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

BOARD OF EDUCATION OF THE EL MONTE SCHOOL DISTRICT OF LOS ANGELES COUNTY, PLAINTIFF(S)	CASE NUMBER: BMC 10832
vs	MEMORANDUM OF COSTS ON APPEAL
MARCUS MORALES CALDERON, DEFENDANT(S)	CLAIMED BY PLAINTIFF and RESPONDENT
	AGAINST DEFENDANT and APPELLANT

1.	Filing fees	$
2.	Preparation of record on appeal	$
3.	Printing of briefs	$ 52.40
4.	Production of additional evidence	$
5.	Notary fees	$
	a.	$
	b.	$
	c.	$
	d.	$
6.	Expenses of service	$
	a.	$
	b.	$
	c.	$
	d.	$
7.	Transmission and filing of record, briefs, and other papers	$
	Total	$ 52.40
	Costs taxed by order of Court	$

STATE OF CALIFORNIA, County of Los Angeles

I am ~~the~~ one of the attorneys of the party who claims costs herein; to the best of my knowledge and belief the items in the within memorandum of costs on appeal are correct; and that said costs have been necessarily incurred.

Dated: February 25, 19 74 At Los Angeles, California.

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

/s/ John J. Wagner

JOHN J. WAGNER (Signature)

APPENDIX K

JOHN H. LARSON, County Counsel
JOHN J. WAGNER, Deputy County Counsel
646 Hall of Administration
500 West Temple Street
Los Angeles, California 90012
(213) 974-1816
ATTORNEYS FOR Defendant and Respondent.

DUPLICATE

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

MARCUS MORALES CALDERON, Plaintiff and Appellant, vs. BOARD OF EDUCATION OF THE EL MONTE SCHOOL DISTRICT OF LOS ANGELES COUNTY, Defendant and Respondent.	CASE NUMBER C 6214 MEMORANDUM OF COSTS ON APPEAL CLAIMED BY DEFENDANT AND RESPONDENT AGAINST PLAINTIFF AND APPELLANT

1.	Filing fees	$
2.	Preparation of record on appeal	$
3.	Printing of briefs	$ 35.35
4.	Production of additional evidence	$
5.	Notary fees	$
	a.	$
	b.	$
	c.	$
	d.	$
6.	Expenses of service	$
	a.	$
	b.	$
	c.	$
	d.	$
7.	Transmission and filing of record, briefs, and other papers	$
	Total	$ 35.35
	Costs taxed by order of Court	$

STATE OF CALIFORNIA, County of Los Angeles

I am ~~SS~~ one of the attorneys ~~XXXX~~ who claims costs herein; to the best of my knowledge and belief the items in the within memorandum of costs on appeal are correct; and that said costs have been necessarily incurred.

Dated: May 28, 1974 At Los Angeles, California.

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

/s/ John J. Wagner

JOHN J. WAGNER (Signature)

APPENDIX L

OPINION

AISO, J.—Defendant Metcalf and a codefendant (not a party to this proceeding) were charged by information with a violation of Penal Code section 288a (oral copulation). Defendant moved to have the information set aside under Penal Code section 995 and to suppress the testimony given at the preliminary hearing by a surveilling police officer under Penal Code section 1538.5 in that the officer's observations were made in violation of defendant's right of privacy under the Fourth Amendment. The motions were denied. Defendant then waived his rights to a jury trial and to confront and cross-examine witnesses, and his privilege against self-incrimination; he further stipulated to the cause being submitted upon the transcript of the preliminary hearing.

Defendant personally and his counsel stipulated with the People's counsel "to 647(b)[1] as the lesser included offense to 288(a) of the Penal Code." After the court stated that it had read and considered the transcript of the preliminary hearing, defendant's counsel argued: "In argument, your Honor, we would point out that the evidence before the Court shows a violation of 647(b). And we would ask that the Court make a finding of the lesser charge. That is the only argument we would submit." Thereupon, the court found defendant "guilty of a violation of Section 647(b) of the Penal Code, a misdemeanor."

Defendant's counsel and defendant personally waived a probation report on this date (December 16, 1970) and the matter of probation and sentence was continued to January 14, 1971.

On January 14, 1971, the court placed defendant upon summary probation conditioned upon defendant's payment of a fine and penalty assessment totaling $125 and with the proviso that probation terminate upon satisfactory proof of payment of the fine. Defendant then proceeded forthwith to the clerk's office and paid the $125. Later the same date, upon defendant's tendering of receipt number M304452, probation was "terminated and case dismissed pursuant to Section 1203.3 . . . and 1203.4" of the Penal Code.

Defendant's counsel, on January 25, 1971, filed a notice of appeal "from the judgment entered in this action against the defendant on January 14, 1971." January 24 fell on a Sunday.

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[1]Penal Code section 647, subdivision (b), provides that every person "[w]ho solicits or who engages in any act of prostitution" is guilty of a misdemeanor and that "[a]s used in this subdivision, 'prostitution' includes any lewd act between persons for money or other consideration."

The tenor of defendant's brief is that he seeks a review of the order denying his motions under Penal Code sections 995 and 1538.5 by way of appeal from a judgment (order granting probation).

(1a) The threshold question is whether there is an appealable order granting probation since defendant's motion[2] under Penal Code section 1203.4 was granted and the case dismissed pursuant to that section.[3] We hold that there was no longer a subsisting order granting probation from which an appeal could be taken. The effect of the grant of defendant's motion under section 1203.4 was to set aside the court's finding of guilty and to cause a dismissal of the information filed against him, releasing defendant "from all penalties and disabilities resulting from the offense of which he [had] been convicted," provided, however, that "in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved" with the "same effect as if probation had not been granted or the . . . information dismissed." (Pen. Code, § 1203.4.)

(2) We think of no instance, however, in which the proviso clause of section 1203.4 about pleading and proving the conviction as if no probation had been granted can be invoked to defendant's detriment where the conviction was for a violation of Penal Code section 647, subdivision (b). Since it was not a felony conviction, it cannot be the basis of impeachment in any other judicial proceeding. (See Evid. Code, § 788, subd. (c).) The misdemeanor conviction here involved is not one which may be used as a basis (an essential element) for making the offense a felony on a second conviction, such as a petty theft with a prior conviction and incarceration for a petty theft (Pen. Code, § 666) or indecent exposure (Pen. Code, § 314). There is no provision making an increase in punishment mandatory upon a second violation of Penal Code section 647, subdivision (b). Normally a misdemeanor conviction cannot be the basis of increased punishment for a subsequent criminal conviction. (See *People* v. *Banks* (1959) 53 Cal.2d 370, 388 [1 Cal.Rptr. 669, 348 P.2d 102].) Consequently, defendant is unable to point out any residual criminal grievance in this case.

(1b) Cases such as *Sibron* v. *New York* (1968) 392 U.S. 40, 50-58 [20 L.Ed.2d 917, 927-932, 88 S.Ct. 1889, 1896-1900] and *In re Byrnes* (1945) 26 Cal.2d 824, 828 [161 P.2d 376] are distinguishable. The defendants therein were granted an appellate review of their convictions even though they had completed their sentences prior to appellate consideration

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[2]The fact that defendant made the motion was confirmed on oral argument.

[3]Since this point was not raised in the Attorney General's briefs, we gave both counsel an opportunity to brief this point by letter memorandum following oral argument. The Attorney General filed such a letter memorandum; defense counsel advised the court that he was foregoing submission of such a memorandum.

of their appeals. But in those cases, the convictions and sentences were still of record and subsistent at the time of review. In this case, the conviction was set aside and the information dismissed upon defendant's motion, thus removing the underpinning of the order granting probation and rendering it a nullity as we have pointed out.

The plea advanced by defendant upon this attempted appeal is not that of moral innocence disclaiming the acts he was charged with having committed in a men's room in a May Company department store, but a technical legal defense (albeit on constitutional grounds). Furthermore, he was not without remedy to have the rulings of the trial court made adversely to him on the 995 and 1538.5 motions reviewed had he chosen to do so by petitioning this court for a writ of prohibition and/or mandamus (Pen. Code, §§ 999a; 1538.5, subd. (i)) or by way of appeal from the order granting probation (Pen. Code, § 1237, subd. 1) before he caused the expungement of his conviction by his own motion under Penal Code section 1203.4 (*People* v. *Banks, supra* (1959) 53 Cal.2d 370, 388-391).

The attempted appeal from the nonexistent judgment (order granting probation) is ordered dismissed.

Stephens, Acting P. J., and Reppy, J., concurred.

APPENDIX M

Younger Announces Plan to Name Woman at Court

Atty. Gen. Evelle J. Younger today had announced a statewide task force designed to help determine "legislative needs" in the field of women's rights.

At the same time, Younger told a Los Angeles news conference that if he were governor, he would fill the first vacancy on the California State Supreme Court with a woman.

Determine Needs

Younger has been mentioned as a possible Republican candidate for governor.

"The objective of this (women's rights) task force will be to help us determine legislative needs in the field of women's rights," Younger said. "We also will be looking for advice on matters such as lawsuits and amicus curiae (friend of the court) briefs we should file in cases relating to women's rights."

On the task force, Younger said, are representatives of the National Organization for Women, the Women's Lawyers Association of Los Angeles, the League of Women Voters of California and the National Council of Jewish Women. Deputy Atty. General Judd Ashmann is coordinating the task force, he said.

Names Appointee

"We have similar task forces working on legislation in other fields and they have spearheaded some important legislation such as nursing home reforms developed at the last session," Younger explained.

The attorney general said he has told State Appellate Justice Mildred Lillie she would be his first appointee to the State Supreme Court.

"I then would appoint a woman to the Superior Court to fill her spot on the District Court of Appeals," Younger said. "I would then appoint a woman from the Municipal Court to fill that position on the Superior Court and then I would appoint a woman lawyer to go on the Municipal Court."

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IN THE

Supreme Court of the United States

October Term 1974

No. 74-133

MARCUS MORALES CALDERON,
Petitioner,

vs.

BOARD OF EDUCATION OF THE EL MONTE SCHOOL DISTRICT OF LOS ANGELES COUNTY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

JOHN H. LARSON,
County Counsel
DONOVAN M. MAIN,
Deputy County Counsel
JOHN J. WAGNER,
Deputy County Counsel
606 Hall of Administration
500 West Temple Street
Los Angeles, California 90012
(213) 974-1816
Attorneys for Respondent.

WESTERN PRINTING COMPANY, WESTWOOD—ORDER 0-1755

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IN THE

Supreme Court of the United States

October Term 1974

No. 73-133

MARCUS MORALES CALDERON,
Petitioner,

vs.

BOARD OF EDUCATION OF THE EL MONTE SCHOOL DISTRICT OF LOS ANGELES COUNTY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

QUESTIONS PRESENTED

1. Has a state statute been drawn in question on the ground of its being repugnant to the United States Constitution, or has any right or privilege been specially set up under the United States Constitution so as to invoke this Court's jurisdiction under Title 28, United States Code, § 1257(3)?

2. Has a federal question of substance been decided so as to cause this Court to exercise its discretion to review this case under its Rule 19(1)(a)?

STATEMENT OF THE CASE

On May 6, 1970, petitioner was arrested for violation of Penal Code Section 288a (oral copulation).

On March 9, 1971, the Governing Board informed him that pursuant to Education Code Section 13443, it had decided not to re-employ him for the next school year (1971-72) on the ground of immoral conduct. Petitioner thereupon demanded the hearing before the Board to which he was entitled. (§ 13443, then subdivision (c) — now subdivision (d).)

On April 16, 1971, the Board through a hearing officer, held a hearing to determine the propriety of its refusal to re-employ petitioner for the coming school year. Following the hearing, the hearing officer found that petitioner had "engaged in sexual conduct with an adult male that was lewd, indecent, and dissolute," and that the conduct involved moral turpitude. The hearing officer concluded that the conduct related to the welfare of the schools and the pupils thereof. The Board adopted this decision as its own. Petitioner then initiated a mandamus proceeding in the Superior Court pursuant to the provisions of California Code of Civil Procedure 1094.5.

On August 30, 1971, the Court denied his petition.

Subsequent to the denial of that petition, the petitioner timely filed a Notice of Appeal in the Court of Appeal. The Court of Appeal affirmed the judgment of the trial court in a unanimous decision in 2d

Civil No. 40727. The petitioner thereupon filed a Petition for Hearing in the California Supreme Court which was denied by the California Supreme Court on July 9, 1974. From that denial, petitioner filed the present petition for writ of certiorari with your Honorable Court.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Not only is there no *substantial* federal issue in this case, there is simply no federal or constitutional issue at all.

Respondent, a probationary teacher, was not re-employed by the respondent district for the 1971-72 school year because he engaged in an act of immoral conduct which involved moral turpitude.

California statutory law provided that a governing board's decision not to re-employ a probationary teacher for the ensuing school year could be for cause only, and such cause had to relate solely to the welfare of the schools and the pupils thereof. The Superior Court, as well as the Court of Appeal, found that immoral conduct is cause and grounds for non-re-employment under Education Code Section 13443.

There can be no doubt that the scope of the decision of the Court of Appeal rested entirely on statutory grounds. Justice Colby's opinion which is before the court applies the facts of the situation to the provisions

of Education Code Section 13443 and contends that the Governing Board is authorized to not re-employ the petitioner for the 1971-72 school year.

In addition thereto, the issue which the petitioner raises in his petition for writ of certiorari is moot in that the United States Supreme Court in the matter of *Calderon v. Board of Education of El Monte School District of Los Angeles County,* U.S. Supreme Court No. 73-1615, rejected the appeal and treating it as a writ of certiorari, declined to hear the issue. Because of the United States Supreme Court's actions in that matter, even if all of the relief asked for in the present petition were granted, the petitioner would not be entitled to re-employment and as such the present matter is moot.

CONCLUSION

In sum, there is simply no federal or constitutional question to review and that even if there were, the issues presented in this petition are moot.

Respectfully submitted,

JOHN H. LARSON,
County Counsel

JOHN J. WAGNER,
Deputy County Counsel

By DONOVAN M. MAIN,
Deputy County Counsel
606 Hall of Administration
500 West Temple Street
Los Angeles, California 90012
(213) 974-1929
Attorneys for Respondent.